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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. DANIEL JOSEPH ALBANO, Defendant and Appellant.	C077840 (Super. Ct. No. CRF130484)

Defendant Daniel Joseph Albano appeals his convictions for multiple sex offenses committed against the same, then 14-year-old, victim. He contends the prosecutor committed misconduct in asking whether other witnesses were lying; the protective order was unauthorized and must be stricken; and the trial court abused its discretion by not suspending execution of sentencing and placing him on probation. We find no error and affirm the judgment.

BACKGROUND

When the victim C.M. was 14 years old she and her family were very close with defendant and his family.[1] C.M.'s brother and defendant's stepson were best friends and played football together in Winters. The families did various activities together such as camping, barbecues, and parties. C.M. thought of defendant as an uncle. When C.M. was 14 years old, defendant was in his early 40's.

Shortly after her 14th birthday, C.M. and her family went to a Super Bowl party at another family friend's house. The adults were drinking and C.M. was mostly by herself in the living room. At some point, defendant came in and tried to kiss her in a romantic way. She pushed him away. She was in shock and confused and did not do anything further.

The next day, C.M. and defendant were driving to the store together. He told her he had been "really drunk, and to just . . . forget about it, and to not say anything about it." He specifically told her not to tell his wife, Stephanie.

On another occasion after the Super Bowl party, C.M. was driving with defendant to Winters to one of the boys' sporting events. As he drove, defendant took C.M.'s hand, put it over his clothed erect penis, and moved it around. He asked C.M. if she liked it and told her she was "hot." Defendant also reached over and placed his hand in her lap, outside her clothes. C.M. did not know what to think and felt frozen. She did not tell anyone what happened because defendant again told her not to tell anyone, and made her feel like she would be responsible for breaking up his marriage and hurting his wife. Afterwards, she tried to act as though nothing had happened, and was "kind of in denial."

After C.M. finished eighth grade, the families rented a vacation house at Dillon Beach. One evening, defendant came into C.M.'s bedroom, tried to kiss her, and

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1 C.M. was 22 years old at the time of trial.

"touched her inappropriately." He grabbed her face, put his tongue in her mouth, reached under her shorts, and touched her vagina with his fingers. She was again frozen. He left her room after about five to 10 minutes. C.M. was upset, but tried to pretend it was not happening.

Kevin Ray had arranged for the families to rent the beach house and noticed defendant looked at C.M. a lot, and looked as though he was "undressing her with his eyes." He never saw anything inappropriate happen between defendant and C.M.

After Dillon Beach, during C.M.'s freshman year of high school, defendant had a Halloween party at his home. C.M. was getting ready for the party at defendant's house. Defendant came into the bathroom she was in, grabbed her breasts, pulled down her tights and began orally copulating her. She felt confused when he left the bathroom. She did not say anything to her friends that night, and again tried to forget about it. C.M.'s friend, M.P., saw defendant walk out of the bathroom, and that C.M. looked upset. After the party, defendant continued to touch C.M. inappropriately, "he would like grab my butt or . . . make a pass at me."

Several months after the Halloween party, C.M. told her friend M.P. what defendant had done. M.P. wanted C.M. to tell her parents. C.M. told M.P. she did not want to tell her parents because defendant had a family and he did not want to "bring anything up." C.M. also told her boyfriend. He wanted to report defendant, but C.M. begged him not to.

When she was 19 years old and home from college, defendant invited C.M. to go with him on a trip to San Francisco and suggested they could get a hotel room together. C.M. did not accept the invitation.

That same year, when she came home for Thanksgiving, C.M. told her parents what defendant had done. C.M.'s parents called law enforcement and filed a police report. Initially, C.M. did not want to press charges and waited almost one year before

deciding to do so. She decided to press charges because she did not want defendant to abuse his daughter or any of her friends.

A few days after Thanksgiving, C.M.'s mother, W.M. (mother), told defendant's wife Stephanie that defendant had been molesting C.M. and provided some of the specific details. Defendant texted C.M.'s father, J.M. (father), "I am so sorry for all the hurt and pain that I've brought to you, [mother], and, especially, [C.M.] I never meant to hurt her or betray our friendship." The second message said, "I am a piece of shit who let drugs and booze make me into a scumbag. I have now lost everything I cared about. I do not deserve to live. I'm truly sorry." Father replied, "If it's booze and drugs that are influences that are fucking up your thought process and your life then I recommend you seek help for that." Defendant responded, "You're right. I'm so sorry . . . ." Father explained that there was nothing else going on at that time that these messages could have been about.

After deciding to press charges and meeting with law enforcement, C.M. placed a pretext call to defendant. During that call, defendant repeatedly apologized to C.M. for everything he had done. He was sorry for "treating [her] that way, and doing that to [her] family" and his family. He told her he "wish[ed] that had never happened" but there was "nothing [he could] say that's going to make anything better." He told C.M. he felt "like shit" and it was "all [his] fault," "there's no blame to go around to anybody but me." C.M. asked him to explain what he was sorry for, he said, "for everything" and then said that he was "just a lecherous piece of shit." C.M. asked him to acknowledge what he had done to her, and he said he was "not going to deny—everything that you said to Steph, I'm not going to deny anything." He told her that he did not "even remember half of it" but that he had "no reason to doubt anything that [she] said." Defendant admitted he was in "counseling for awhile." He admitted he "took advantage of [her] niceness." When C.M. asked if he remembered pinning her against the wall in the bathroom and "going down" on her, he claimed that he did not remember it, but "I must have, you know? . . . .

I'm not saying I didn't." When asked if he remembered Dillon Beach, defendant stated, "I don't remember a lot . . . . Whatever I did, I'm sorry. . . . I really am sorry. I can't stand what I've done to you . . . ." Defendant was arrested two days later.

One neighbor Ruth had looked at defendant's computer with Stephanie. They found defendant's MySpace page. His only friend was C.M. Ruth had also observed defendant looking at C.M. with a "different smile." Other neighbors, Megan and Bradley, never saw any inappropriate conduct between defendant and C.M. Megan, however, had a feeling she had walked in on an inappropriate conversation between defendant and C.M. during the Dillon Beach trip.

Defendant told his stepson that he had a crush on C.M. and would flirt with her, but "nothing ever happened." The stepson knew defendant used drugs, and did so on and off throughout his marriage with Stephanie. He never saw anything inappropriate or physical between defendant and C.M.

Defendant denied all of C.M.'s allegations. He acknowledged he had flirted with her, but claimed he was a "flirty person" and had flirted with others as well. He believed when C.M. was 16 years old, she had a crush on him. He acknowledged he had invited C.M. and her roommates to join him in San Francisco, but denied that he had any sexual intent in the invitation. Despite this, he acknowledged it was wrong and appeared "creepy." Defendant claimed his text messages apologizing to C.M.'s father were in regard to this inappropriate invitation to San Francisco.

As to his statements in the pretext phone call, he claimed he knew C.M. was going through "a couple [of] issues" and he did not "want to be argumentative with her." He had picked up the phone "to apologize for that night" for inviting her to San Francisco.

Defendant denied ever telling his stepson he had a crush on C.M., saying his stepson took the statement out of context. He also claimed C.M. was a liar and the other witnesses were either lying or mistaken.

An information charged defendant with one count of attempted lewd or lascivious acts upon a child 14 or 15 years of age (Pen. Code, §§ 664/288, subd. (c)(1); count 1),[2] and five counts of lewd or lascivious acts upon a child 14 or 15 years of age (§ 288, subd. (c)(1); counts 2 through 6). A jury found appellant guilty on counts 1, 2, 3, 4, and 6, but not guilty on count 5. After considering the evidence at trial, the probation officer's report, the arguments of the parties, and a psychological evaluation, the trial court denied probation and sentenced appellant to an aggregate term of four years four months in state prison. The trial court also imposed a protective order pursuant to section 136.2.

DISCUSSION

I

Defendant contends the prosecutor committed prejudicial misconduct by repeatedly asking defendant if other witnesses were lying. Defendant claims the questions were argumentative and designed to inflame the jury against defendant, rather than exploring whether defendant knew of any reason the witnesses would have to lie. The People contend the issue is forfeited because defendant failed to object to the prosecutor's questions, the questions were not improper, and any misconduct was harmless. We conclude the questions did not constitute misconduct.

Background

During cross-examination, defendant claimed C.M. had made false allegations and those allegations had ruined his life. He said during the pretext phone call, he thought C.M.'s father was listening in, and he did not correct C.M.'s misrepresentations about what happened between them, because he was not willing to "rip" C.M.'s parents for believing her. "Their daughter's a liar, but I'm not going to rip them for believing, because if it was my daughter, I would believe her too."

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[2] Undesignated statutory references are to the Penal Code.

The cross-examination continued:

"Q. [PEOPLE:] So was her friend who saw you coming out of the bathroom at Halloween, right?

"A. [DEFENDANT:] She didn't see me coming out of the bathroom, that's her [best] friend. I mean, she didn't see me come out of the bathroom.

"Q. [PEOPLE:] So she's a liar too?

"A. [DEFENDANT:] Or she's mistaken. I don't think she was even at the party at that time.

"Q. [PEOPLE:] You heard her testify here, [defendant]?

"A. [DEFENDANT:] I did. And did you see my reaction?

"Q. [PEOPLE:] What was she saying on the stand? She said, 'I saw him coming out of the bathroom with [C.M.], she was upset,' are you telling me that's the truth or a lie?

"A. [DEFENDANT:] That's a lie.

"Q. [PEOPLE:] Okay. So not only [C.M.'s] lying, her friends are lying?

"A. [DEFENDANT:] Yes.

"Q. [PEOPLE:] And when people saw you drive away with [C.M.] in the car to go get people at football practice, they're lying?

"A. [DEFENDANT:] Who saw me drive away?"

Defense counsel objected, on the grounds, "Asking who's lying. If people are lying. Other witnesses." The trial court overruled the objection.

The prosecutor asked whether C.M.'s mother had lied on the stand regarding seeing defendant driving with C.M. to pick up the boys from football practice. Defense counsel objected. The trial court asked for the evidentiary rule supporting the objection, and defense counsel answered, "Inquiring whether or not another witness is lying." The trial court overruled this objection.

Cross-examination continued:

"Q. [PEOPLE:] Are you saying that when [mother] testified on the stand that she saw you in the car with [C.M.] going to pick kids up at football practice?

"A. [DEFENDANT:] I don't think she testified that she saw me taking [C.M.] to football practice.

"Q. [PEOPLE:] But if she said that?

"A. [DEFENDANT:] She said—yeah, that would be a lie.

"Q. [PEOPLE:] Okay. And would it be a lie that people saw you on the beach with [C.M.] having a conversation at Dillon[] Beach?

"A. [DEFENDANT:] No.

"Q. [PEOPLE:] You did that?

"A. [DEFENDANT:] Yes.

"Q. [PEOPLE:] How about the fact that you continued to look at her and have elevator eyes, or look her up and down, undress her with your eyes.

"A. [DEFENDANT:] I'll dispute that, that didn't happen.

"Q. [PEOPLE:] So if someone said that, that would be a lie?

"[DEFENSE COUNSEL]: Objection. Same objection.

"A. [DEFENDANT]: I don't consider it to be a lie, it would just be a mistake. Because it didn't happen.

"THE COURT: Objection's overruled.

"Q. [PEOPLE:] How about when Ruth [] saw you giving looks to [C.M.] that she never seen you give to Stephanie at a barbecue pit?

"A. [DEFENDANT:] Did she say that?

"Q. [PEOPLE:] I'm asking you, would that be a lie?

"A. [DEFENDANT:] Did she say that?

"Q. [PEOPLE:] I'm asking if that would be a lie?

"A. [DEFENDANT:] That would be a lie. She smiled at me, I smiled at her, if that happened.

"Q. [PEOPLE:] What have you done to [C.M.] that would make her so angry that she needs to lie and ruin your life?

"A. [DEFENDANT:] That's a good question.

"Q. [PEOPLE:] There's nothing, is there?

"A. [DEFENDANT:] Getting back with my wife. She didn't—she didn't believe the accusation because the accusations are false. I mean, it took her a year later, I mean, to file these things.

"Q. [PEOPLE:] So nothing else in your life that you've done to [C.M.] would ever cause her to just make up these rampantly false accusations against you?

"A. [DEFENDANT:] I don't—I don't know the psyche of a teenage girl or a young woman. I don't know.

"Q. [PEOPLE:] You've been nothing but a good person to her?

"A. [DEFENDANT:] Yes.

"Q. [PEOPLE:] And yet she has made up these complete [*sic*] false accusations and ruin [*sic*] your life?

"[DEFENSE COUNSEL]: Same objection.

"THE COURT: Overruled.

"A. [DEFENDANT]: Correct."

Having failed in trial to interpose timely objections during the course of questioning, later that day, following the close of the defense case and discussion of jury instructions, defendant moved for a mistrial alleging prosecutorial misconduct and requested an admonition to the jury, based on the prosecution repeatedly asking whether other witnesses were lying in their testimony. The court took the matter under submission and asked the parties to submit authorities the following day.

The following day, the court heard argument on the motion for mistrial. Defense counsel argued the prosecutor's questions were improper because they were not used to clarify a witness's testimony, but to berate defendant, and to have him call other

witnesses liars to inflame the jury. The prosecutor indicated she was asking defendant to clarify his statement that C.M. was lying, and to try to understand if defendant believed only C.M. was lying, "or if this was some grand conspiracy by all the witnesses that are all making this up to . . . find him guilty." She noted defendant had first brought up that C.M. was a liar, and accordingly she believed it was fair cross-examination. The trial court found the prosecutor's questions were not asked for an argumentative purpose or to inflame the jury. Rather, given the discrepancies between defendant's testimony and that of the other witnesses, the prosecutor was effectively asking, "Is there any explanation for the testimony of all these other witnesses, because you are the person that has all the information. So you give us that explanation." The trial court also found the exchange was "an opportunity for the defendant to explain whether there was any other evidence that he had, any other facts, because that's what the questions are. They're to elicit factual responses for the jury to make a determination. And that's what the question asked [*sic*]." Accordingly, the trial court denied defendant's motion.

Analysis

" 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' [Citation.]" (*People v. Chatman* (2006) 38 Cal.4th 344, 380 (*Chatman*).) Defense counsel objected to a number of the "were they lying" questions, but did not state prosecutorial misconduct as the grounds for the objection. The trial court overruled the objections. Immediately after defendant finished testifying, defense counsel moved for a mistrial based on prosecutorial misconduct, and requested the court admonish the jury. The court denied the motion. This was sufficient to preserve the objection for purposes of appeal. (See *Chatman, supra,* at p. 380; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 236-237.)

State and federal law standards of prosecutorial misconduct differ. "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citation.] A prosecutor's conduct ' "that does not render a criminal trial fundamentally unfair" ' violates California law ' "only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 110-111.)

Most of the federal courts of appeals that have examined the propriety of questions posed to a criminal defendant about the credibility of government witnesses have found that such questions are improper, reasoning "that such questions are improper because they invade the province of the jury by forcing defendants to assess the credibility of others who have testified." (*U.S. v. Schmitz* (11th Cir. 2011) 634 F.3d 1247, 1268, and cases cited therein.) However, " '[i]t is essential . . . to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth.' [Citation.] Consequently, such questions would obviously be proper if a defendant opened the door by testifying on direct that another witness was lying." (*U.S. v. Harris* (3d Cir. 2006) 471 F.3d 507, 512.) The United States Supreme Court has never dealt with the issue.

Here, defendant offered his opinion the victim was a liar. As the trial court concluded the prosecutor did not ask subsequent, related questions to mislead or inflame the jury, but rather, to serve a factfinding purpose. We note the questions were not extensive in view of the record as a whole. Thus, even under the federal cases, "it is not likely that such questions, standing alone and without objection," would suffice to establish reversible error. (*U.S. v. Harris*, *supra*, at p. 512.)

The jury knew defendant's testimony was entirely inconsistent with C.M.'s and with the other witnesses' testimony. The evidence against defendant was strong, including other witnesses corroborating some details of C.M.'s testimony, and

defendant's own words accepting responsibility and apologizing for his lecherous conduct in both text messages to father and the pretext phone call with C.M. The questions defendant challenges simply did not infect this trial with fundamental unfairness causing a denial of due process. Accordingly, the questions did not result in reversible error.

Under state law, there is misconduct when a prosecutor uses deceptive or reprehensible methods to attempt to persuade the trial court or the jury. One such method is "eliciting or attempting to elicit inadmissible evidence" in defiance of a court order. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) "A defendant's conviction will not be reversed for prosecutorial misconduct" that violates state law, however, "unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*Ibid.*)

"Were they lying" questions are not, categorically and always, proper or improper. When a prosecutor asks a defendant if another witness was lying, the trial court must consider the question in context to determine if there was misconduct. (*Chatman, supra*, 38 Cal.4th at pp. 381-382.) "If a defendant has no relevant personal knowledge of the events, or of a reason that a witness may be lying or mistaken, he might have no relevant testimony to provide. No witness may give testimony based on conjecture or speculation. [Citation.] Such evidence is irrelevant because it has no tendency in reason to resolve questions in dispute. [Citation.]" (*Id.* at p. 382.) That said, "[t]he permissible scope of cross-examination of a defendant is generally broad. 'When a defendant voluntarily testifies, the district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them. [Citation.] A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the

same facts, limit the cross-examination to the precise facts concerning which he testifies. [Citation.]' [Citation.] [¶] A defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, he might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken. When, as here, the defendant knows the other witnesses well, he might know of reasons those witnesses might lie. Any of this testimony could be relevant to the credibility of both the defendant and the other witnesses. There is no reason to categorically exclude all such questions." (*Ibid*.)

Here, defendant was a percipient witness to the events at issue and had personal knowledge as to the accuracy and truthfulness of the other witnesses' testimony. The questions all related to specific facts and circumstances about which defendant testified. Defendant personally knew all of the other witnesses and had been close friends with most of them. Accordingly, he could provide insight as to whether they were mistaken or intentionally lying, and what bias or motive those witnesses might have. For example, he testified C.M. was a liar and had made these false accusations because he had gotten back together with his wife; he testified C.M.'s friend M.P. was either lying because C.M. was her best friend or she was mistaken because she was not at the party at the time; and, he testified other witnesses were mistaken in their testimony about him undressing C.M. with his eyes. Finally, the trial court, having witnessed the questioning, found the questions were not asked to be argumentative or to inflame the jury, but rather to serve a factfinding purpose, that is, provide defendant the opportunity to explain the discrepancies in testimony between the witnesses. Accordingly, we find the questions were not improper and there was no prosecutorial misconduct in that the questions simply did not render a criminal trial fundamentally unfair or involve the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.

II

Defendant contends the protective order imposed under section 136.2 must be stricken, as such an order is only authorized while a case is pending in the trial court. His argument rests on the fact that "courts have construed section 136.2, subdivision (a) to authorize imposition of protective orders only during the pendency of the criminal action. [Citations.] Thus, once the defendant is found guilty and sentenced, the court's authority to issue a protective order under section 136.2, subdivision (a) generally ceases. [Citations.]" (*People v. Beckemeyer* (2015) 238 Cal.App.4th 461, 465.) Defendant did not object to the imposition of the restraining order. Defendant contends an objection was not necessary as the order was unauthorized. We disagree.

Effective January 2012, "the Legislature added section 136.2, subdivision (i) to the statutory scheme so that a 10-year postconviction protective order would be permissible when a defendant was convicted of a domestic violence offense." (*People v. Beckemeyer, supra*, 238 Cal.App.4th at p. 465, fn. omitted.) Effective January 2014, the statute was again amended, adding postconviction protective orders for convictions of specific sex offense and any offense that requires a defendant to register under section 290, subdivision (c). (Stats. 2013, ch. 76 (Assem. Bill No. 383 (2013-2014 Reg. Sess.) § 145.) "The order may be valid for up to 10 years, as determined by the court. This protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison or a county jail, or whether imposition of sentence is suspended and the defendant is placed on probation." (§ 136.2, subd. (i)(1), as amended by Stats. 2013, ch. 76 (Assem. Bill No. 383) § 145.) Defendant was convicted in May 2014 of offenses which require registration under section 290, subdivision (c). Accordingly, the order was authorized.

III

Defendant contends the trial court abused its discretion by not suspending execution of sentence and placing him on probation. We find no abuse.

" 'All defendants are eligible for probation, in the discretion of the sentencing court [citation], unless a statute provides otherwise.' [Citation.] 'The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]' [Citation.] 'In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.' [Citation.]" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311, disapproved on other grounds in *People v. Cook* (2015) 60 Cal.4th 922, 939.)

At sentencing, considering the factors in California Rules of Court, rule 4.414, the trial court found the nature of the crime was a serious offense, the victim was vulnerable, and there was a breach of trust in the commission of the offense because of the close familial type relationship between defendant and the victim. The court noted C.M. had suffered a serious emotional injury. The conduct took place over several months and defendant told the victim that all of the friendships between the families, as well as his marriage would be compromised if she spoke up about what he had done. The court also noted defendant "did not show remorse at any time during [the] proceeding until perhaps the posttrial interviews and then [at sentencing]." Accordingly, the trial court denied the request for probation.

Defendant identifies various mitigating factors found in California Rules of Court, rule 4.414, which he asserts favor probation in this case. He indicates he had no prior serious criminal record or history of violence, and that imprisonment would have an adverse impact on both himself and his young daughter. He also relies on the psychological evaluation by Dr. Rokop opining that defendant was not a pedophile, his risk of reoffense was low, and he was amenable to probation. Defendant argues the factors the trial court relied upon do not apply, as all victims of section 288 are

vulnerable, the breach of trust was already accounted for in the issue of vulnerability, and his apparent lack of remorse was while he was maintaining his innocence.

Only a single factor is required to justify a denial of probation. (*People v. Scott* (1994) 9 Cal.4th 331, 350, fn. 12.) A trial court may reject or disregard any mitigating circumstance without stating reasons. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) " 'Particular vulnerability,' " may not be used as an aggravating offense where the vulnerability is based solely on age and age is an element of the offense. "However, 'particular vulnerability' is determined in light of the 'total milieu in which the commission of the crime occurred . . . .' (*People v. Price* (1984) 151 Cal.App.3d 803, 814.)" (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693-1694 (*Dancer*), overruled on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.) A victim's age, together with other circumstances can establish "particular vulnerability" as an aggravating factor. Here, not only was C.M. young when the crimes occurred, but she was afraid to tell her parents what defendant was doing, because she believed it would hurt defendant's wife, someone she loved, and would destroy the relationships between the families. Because of the relationships between defendant and C.M.'s family, C.M. was unable to protect herself from her molester as she normally would have by telling her parents or Stephanie what was happening, because she wanted to protect them. Defendant preyed on this vulnerability and told her not to tell anyone, especially not his wife, and made her feel like she would be responsible for breaking up his marriage if she told. Defendant's actions removed C.M. from their protective ambit and made her particularly vulnerable. These facts support the finding that C.M. was particularly vulnerable. (See *Dancer, supra,* 45 Cal.App.4th at pp. 1694-1695.)

Furthermore, defendant violated a position of trust. The families were close; they had numerous social events together, including family vacations. C.M. viewed defendant as an uncle. Her parents trusted him to be alone with C.M. Defendant was a person in whom both C.M. and her parents reposed trust and confidence. Accordingly, the trial

court properly considered this as a factor in aggravation. (*People v. Dancer*, *supra*, 45 Cal.App.4th at pp. 1694-1695; *People v. Franklin* (1994) 25 Cal.App.4th 328, 338.)

In reaching its decision, the trial court considered the probation report, the psychological evaluation, the victim impact statements, the statements of C.M.'s parents and defendant's wife, defendant's sentencing brief, counsels' arguments at the hearing, and defendant's statements. The court was aware of its discretion and the factors to consider in exercising that discretion. Thus, the trial court was aware of the aggravating and mitigating factors related to defendant and properly considered them.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

MAURO, J.

MURRAY, J.